90-2040

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARC A. DUMFORD,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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August 1990

QUESTIONS PRESENTED

I. Whether a military order requiring the petitioner to inform all sexual partners that he is positive for the Human Immunodeficiency Virus (HIV), and to prevent transfer of bodily fluids during sexual intercourse, is unlawful for being overbroad and exceeding any military necessity.

II. Whether a specification alleging aggravated assault under Article 128, Uniform Code of Military Justice is unconstitutionally vague as applied to the petitioner, when the aggravation element is premised upon the petitioner's medical condition of being infected with HIV.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Marc A. Dumford, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on May 10, 1990.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 30 M.J. 137 (C.M.A. 1990) (Appendix B). The opinion of the Air Force Court of Military Review is reported at 28 M.J. 836 (A.F.C.M.R. 1989) (Appendix A).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on May 10, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. III 1985) and 10 U.S.C. 867(h) (Supp. III 1985).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

The petitioner, an Air Force enlisted person, was tried by a general court-martial in a judge alone trial at Lackland Air Force Base, Texas, on August 25, 1988. He pled guilty to willful disobedience of an order requiring him to inform sexual partners prior to engaging in sexual relations and to use proper methods to prevent the transfer of bodily fluids during sexual relations. He further pled guilty to aggravated assault. He was sentenced to a dishonorable discharge, confinement for two years, total forfeiture of all pay and allowances and reduction to E-1.

Petitioner was screened for the Human Immunodeficiency Virus (HIV), the virus that causes Acquired Immune Deficiency Syndrome (AIDS). On February 1, 1988, he was sent to the Wilford Hall Medical Center at Lackland Air Force Base in San Antonio, Texas for further medical tests and an orientation regarding the nature of the infection. Petitioner's diagnosis included the determination that he was in status 1a, which meant that he did not exhibit any symptoms of AIDS.

On February 4, 1988, the petitioner received as part of his orientation, a "safe sex" order from his doctor, Captain Abbedessa. The order required him to (1) inform sexual partners that he was HIV positive prior to engaging in sexual relations, (2) use proper methods to prevent the transfer of body fluids during sexual relations, including the use of condoms, and (3) inform

medical personnel rendering emergency care to him that he was HIV positive.

The following evening, while on pass from the hospital, the petitioner met Judith F. Carrell at the Non-Commissioned Officers Club at Lackland Air Force Base. They later engaged in sexual intercourse at an off-base hotel. He did not inform Ms. Carrell that he was HIV positive, nor did he use protective measures to prevent transfer of body fluids during sexual intercourse. Ms. Carrell, who lived in Houston, Texas, has no direct connection with the United States military. She was in San Antonio on a sight seeing visit with some friends.

This single liaison with Ms. Carrell constitutes the substance of both charges of which the petitioner has been convicted. At trial, the petitioner did not question the lawfulness of the "safe sex" order, nor the sufficiency of the assault specification.

REASONS FOR GRANTING THE WRIT

I

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), this Court recognized that the specific guarantees in the United States Constitution's Bill of Rights have penumbras where individual privacy is protected from governmental intrusion. In *Griswold*, the Court found that the right of marital privacy was within these penumbras.

Constitutional concepts of due process of law have long been extended to members of the military. *United States v. Clay*, 1 U.S.C.M.A. 74, 1 C.M.R. (1951). This case presents the issue of whether the military may criminally enforce an order restricting one's constitutional right to privacy in the absence of any military purpose other than concern for limiting the spread of HIV.

An order, to be lawful, must relate to a military purpose. The Manual for Courts-Martial, United States,

1984, Part IV, Paragraph 14(c)(2)(A)(iii) recognizes an order may not restrict a service member's right to privacy absent a clear military need:

> The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs.

Thus, when an order fails to meet the above requirements and is broadly restrictive of a private right, it is arbitrary, patently illegal, and will be struck down. *United States v. Smith*, 23 U.S.C.M.A. 542, 50 C.M.R. 715 (1975); *United States v. Wilson*, 12 U.S.C.M.A. 165, 30 C.M.R. 165 (1961).

The United States Court of Military Appeals has erroneously determined in this case that the "safe sex" order has a valid military purpose. The court said: "[W]e are certain that, when a servicemember is capable of exposing another person to an infectious disease, the military has a legitimate interest in limiting his contact with others, including civilians." *United States v. Dumford*, 30 M.J. 137, 138 (C.M.A. 1990).

The Court of Military Appeals has thus indicated that military necessity may be met by the most tenuous of links to military mission, morale, discipline, or maintenance of good order. This reasoning runs contrary to prior precedent, and it stretches the definition of military necessity beyond any reasonable limitation. Relying upon the court's public relations as military necessity reasoning, one can easily find any order lawful if the restricted behavior has potential to upset the local community. Thus, using the court's public duty and service discrediting test, a commander, in a racially divisive

community, could lawfully order service members not to associate with civilians of another racial group.

II

An accused is entitled to a fair notice of the law. Failure to define a criminal offense without sufficient definiteness that ordinary people can understand what conduct is prohibited results in a denial of due process. *See Kolender v. Larson*, 461 U.S. 351 (1983). Whether or not a criminal statute is unconstitutionally vague must be judged in light of the conduct that is charged to be violative of the statute. *United States v. Mazurie*, 419 U.S. 544, 550 (1975); *United States v. Powell*, 423 U.S. 87 (1975). Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is forbidden. *United States v. Harris*, 347 U.S. 612, 617 (1954); *Parker v. Levy*, 417 U.S. 733, 757 (1974).

The elements of aggravated assault under Article 128 of the Uniform Code of Military Justice are:

> (1) That the accused attempted to do, offered to do or did bodily harm to a certain person;
>
> (2) That the accused did so with a certain weapon, means or force;
>
> (3) That the attempt, offer, or bodily harm was done with unlawful force or violence; and
>
> (4) That the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.

Although the elements of aggravated assault are clearly stated, and Article 128 is not challenged here as unconstitutionally vague on its face, Article 128 becomes unintelligible on what conduct is prohibited when the "means" of the attempted bodily harm is the possible transmission of a virus.

In order to bring AIDS related conduct under Article 128, one must view the conduct "as though under a microscope." Wells Petry, *Anatomy of an AIDS Case: Deadly Disease as an Aspect of Deadly Crime*, Army Lawyer, January 1988 at 23. In doing so, legal concepts of "bodily harm," "grievous bodily harm," and "means or force likely," must be stretched far beyond present legal definitions to bring the conduct under aggravated assault. The offensive touching for bodily harm is no longer the sexual touching itself, but rather, placing HIV at the door to the victim's immune system. The grievous bodily harm must then be the transmission of the virus into the victim's bloodstream. The means is the HIV which the carrier may transmit through unprotected sexual activity, although the experts are unable to provide any clear ideas as to the likelihood of transmission. When experts, courts and legislatures cannot define a crime without confronting the difficulties faced in applying Article 128 to HIV cases, then neither should the petitioner be expected to do so. The need to apply such microscopic analysis clearly denied the petitioner and other HIV carriers notice that their conduct could make them criminally liable for aggravated assault.

CONCLUSION

Our society is clearly inflamed with hysteria over the HIV epidemic. This often results in a callous indifference or overt hostility towards infected persons. However, we cannot allow our legal system to be improperly used as a tool for the further persecution of HIV carriers. Although certain behaviors by HIV infected persons may appropriately fall under specific criminal sanctions, our judicial system should not turn a blind eye to the requirements of proof so as to arduously fit their conduct into ill-fitting, inappropriate offenses, for which inadequate notice has been given. The petitioner submits

that he has suffered a denial of due process of law. Therefore, his petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 1990

APPENDICES

APPENDIX A

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 27212

UNITED STATES

v.

Senior Airman MARC A. DUMFORD,
FR 531-86-7033, United States Air Force

Sentence Adjudged 22 Aug. 1988

Decided 3 May 1989

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Major Mark R. Bell.

Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni and Captain Morris D. Davis.

Before HODGSON, HOLTE AND PRATT, Appellate Military Judges.

DECISION

HODGSON, Chief Judge.

In December 1987, while stationed at Fort Carson, Colorado, the appellant was diagnosed as being infected by the Human Immunodeficiency Virus (HIV). HIV is the virus that causes Acquired Immunodeficiency Disease Syndrome (AIDS). The appellant was flown to the Wil-

ford Hall Medical Center on 1 February 1988, and given an orientation about HIV and the nature of the infection.

On 4 and 5 February, the appellant was given a "safe sex" briefing and ordered to:

(1) Inform sexual partners that he is HIV positive prior to engaging in sexual intercourse;

(2) Use proper methods to prevent the transfer of body fluids during sexual relations including the use of condoms; and

(3) In the event he required emergency care, inform personnel responding to the emergency that he is HIV positive.

The appellant acknowledged he understood the order and agreed to inform any sexual partners of his condition prior to sexual activity and would use protective measures during sexual intercourse.

That same day, 5 February, while on pass from the hospital, the appellant met a girl at the Non-commissioned Officer's Club and later engaged in sexual intercourse with her. He did not tell her he was HIV positive nor did he use protective measures during their sexual relations.

Based on the above facts, the appellant entered an unconditional guilty plea to disobeying the "safe sex" order by not informing his partner of his condition and not using protective measures, as well as to aggravated assault. The approved sentence extends to a dishonorable discharge, confinement for two years, total forfeitures, and reduction to airman basic; the sentence adjudged was less than that negotiated in the pretrial agreement.

While none of the errors urged on appeal warrant setting aside the appellant's conviction, a discussion of some is justified.

I

The appellant contends that the "safe sex" order he disobeyed was illegal as it was overly broad and overreaching and did not relate to any recognized military duty. He maintains he is entitled to have consensual heterosexual intercourse with anyone he chooses so long as both parties are unmarried. He points out that his partner was not a military member, the encounter took place off-base, and suppressing his lawful sexual activity to "demonstrate good faith to the community" lacks any relationship to military duty or the maintenance of good order and discipline. The appellant acknowledges that the military's interest in protecting the health and welfare of the military community is unquestioned, but argues that "protecting every civilian in the world from a military AIDS carrier stretches a valid military interest beyond the point of adequately protecting the rights of the individuals."

Of course, the critical question before us is the lawfulness of the "safe sex" order. An order is presumed to be lawful and an accused has the burden of showing the converse. *United States v. Smith*, 21 U.S.C.M.A. 231, 45 C.M.R. 5 (1972). In this case the lawfulness of the order was not contested at trial, as the appellant pleaded guilty. In the majority of trials it is necessary to contest the validity of the order in the trial forum so that the factual and legal basis for it can be developed in the record. Here the appellant chose not to do so. However, an order that is patently unlawful may be contested for the first time on appeal. The order given the appellant was designed to halt the spread of a fatal disease for which there is no cure presently known. On its face the order is valid and enforceable, and if the appellant thought otherwise he should have asserted his claim at trial. Because he made no objection at trial on this ground, the assigned error is not preserved for appeal. *United States v. Wine*, 28 M.J. 688 (A.F.C.M.R.1989);

United States v. Ashley, 48 C.M.R. 103 (A.F.C.M.R. 1973).

We cannot let stand unchallenged appellate defense counsel's claim that there is no "valid military interest" in requiring a military member who has the HIV to inform potential sexual partners, *civilian* or military, of this fact. Military installations are a part of our society and as we observed in *United States v. Householder*, 21 M.J. 613, 614 (A.F.C.M.R.1985); *pet. denied* 22 M.J. 339 (1968):

> All of the armed services make a concerted effort to become part of and to be accepted in the surrounding civilian community. To this end military installations enthusiastically support charity drives, community projects and local civic organizations, and by so doing strengthen the bond between the defenders and those being defended.

This bond between the armed services and the civilian population would quickly become dangerously frayed if the military took the position that it had no obligation to attempt to prevent the spread of AIDS in the nation at large. An order requiring a servicemember to inform his sexual partners, *civilians* or military, that he is infected with HIV and to protect them from any contact with body fluids and excretions is a lawful exercise of a superior's command authority. *United States v. Womack*, 27 M.J. 630 (A.F.C.M.R.1988); *pet. granted*, 28 M.J. 247 (1989)

II

Appellate defense counsel next contend that the aggravated assault allegation was the "ultimate offense" resulting from the appellant's conduct. It is postulated that since the appellant's failure to tell his sexual partner that he was infected with the HIV coupled with the non-use of protective measures could result in an aggravated assault conviction (*see United States v. Johnson*, 27 M.J.

798 (A.F.C.M.R.1988)), the order given to him by Wilford Hall medical personnel was nothing more than an exhortation to obey the law. Accordingly, the appellant can only be punished within the limits of the "ultimate offense," here aggravated assault, and the punishment for the disobedience allegation must be disregarded. *See United States v. Bratcher*, 18 U.S.C.M.A. 125, 39 C.M.R. 125 (1969). Hence the permissible confinement in this case would be three years, the maximum allowed for aggravated assault.

In *United States v. Pettersen*, Judge Cook addressed the appellant's position and stated:

> Intellectually, this [argument] represents an example of "closed-loop logic" which goes like this: The order, to be legal, must relate to a military duty, which by definition, the accused is already obligated to perform by virtue of his military status. . . . Thus if the defense argument were carried to its logical end, it would eliminate enforcement of most military orders, a condition that no military organization could tolerate.

17 M.J. 69, 70 at n. 1 (C.M.A.1983). The appellant's direct and immediate defiance of the "safe sex" order strikes at the very heart of military discipline and cannot be condoned. The purpose of the "safe sex" order was to halt the spread of a deadly disease, and if the appellant had obeyed that order there would have been no aggravated assault allegation. The offenses are separate and distinct and each could be charged.

In this same light the appellant also maintains that the two offenses are multiplicious for findings. We disagree. The allegations are not identical crimes, one is not the lesser included offense of the other, and the conviction on either does not involve inconsistent findings of fact. *United States v. Lambert*, 17 M.J. 773 (A.F.C.M.R.1983). Applying the guidelines that Chief

Judge Everett set out in *United States v. Doss*, 15 M.J. 409 (C.M.A.1983), we see no basis to grant the relief sought.

III

The appellant next asserts that his guilty plea to aggravated assault was improvident because his partner consented to the sexual activity. As in *United States v. Johnson*, *supra*, we find this argument unpersuasive. Addressing the same claim in *Johnson*, Senior Judge Kastl wrote:

> In the first place, the victim's "consent" was uninformed; [the victim] did not know his partner was infected. Furthermore, regardless of consent, the military judge correctly found that consent by the victim is not a valid defense when the conduct is of a nature to be injurious to the public as well as to the party assaulted. We too find no valid consent here: Whatever the degree of assent to sexual by-play between the individuals, there was no approval by the victim to the transmission of the AIDS disease. (Citations omitted).

27 M.J. 798, 803. We reach the same conclusion here and hold that the victim did not consent to the appellant's conduct. The guilty plea was provident.

IV

The remaining assigned error is decided against the appellant. *United States v. Fields*, 17 M.J. 1070 (A.F.C.M.R.1984); *see also Satterfield v. Drew*, 17 M.J. 269 (C.M.A.1984). For the reasons stated the findings of guilty and the sentence are

AFFIRMED.

Judges HOLTE and PRATT concur.

APPENDIX B

U.S. COURT OF MILITARY APPEALS

No. 63,033

ACM 27212

UNITED STATES,

Appellee,

v.

MARC A. DUMFORD, Senior Airman,
U.S. Air Force,

Appellant.

May 10, 1990

For Appellant: *Colonel Richard F. O'Hair* and *Captain Bernard E. Doyle, Jr.*

For Appellee: *Colonel Joe R. Lamport, Major Terry M. Petrie,* and *Captain Morris D. Davis.*

PER CURIAM:

Appellant stands convicted, pursuant to his pleas, of two specifications: Willfully disobeying the command of a commissioned officer not to engage in sexual activity without informing his partner that he was infected with the Human Immunodeficiency Virus (HIV) and taking precautions against spreading the virus; and assault with a means likely to produce death or grievous bodily harm, in violation of Articles 90 and 128, Uniform Code of Military Justice, 10 USC §§ 890 and 928, respectively. We

granted his petition for review[1] to determine whether the order was overbroad. After considering the contents of the order and the context of the violation, we uphold the decision of the Court of Military Review. 28 MJ 836 (1989).

In *United States v. Womack*, 29 MJ 88, 89 (CMA 1989), we concluded that, in general, issuing a "safe sex" order to a servicemember infected with HIV, which "is a progenitor to the Acquired Immune Deficiency Syndrome (AIDS) disease," is a valid exercise of military authority. The order here is similar in content to the one challenged in *Womack*. It is equally clear, definite, and certain as to its requirements. The only question is whether a valid military necessity existed as to scope because the order required appellant to warn civilians as well as servicemembers.

In *Womack* the sexual activity consisted of an act of nonconsensual homosexual sodomy with a fellow servicemember. Because the armed forces have an interest in preserving the health and readiness of their servicemembers, the order there had a clear military purpose. *See also United States v. Negron*, 28 MJ 775, 778 (ACMR), *aff'd*, 29 MJ 324 (CMA 1989).

Appellant argues that, as applied to consensual, nondeviant, sexual intercourse with a female civilian, the order restricts his personal rights. However, as we noted in *Womack*, many states have enacted statutes limiting the personal liberties of those persons who carry HIV, statutes which are far more restrictive than the present order. 29 MJ at 90. This order did not prohibit sexual contact; rather, it set forth terms under which appellant could enage in such activities. Thus, even to the extent that the order may have limited appellant's freedom, it

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[1] We construe the issue presented by appellant as asserting that the specification does not state an offense, rather than suggesting that he had a valid defense to the crime.

is not so broadly drawn as to warrant invalidating the order.

Appellant's argument that the order lacks any valid military purpose is without merit. In *United States v. Stewart*, 29 MJ 92 (CMA 1989), we took note of the dangers of unprotected sexual intercourse by those infected with HIV. Consequently, we are certain that, when a servicemember is capable of exposing another person to an infectious disease, the military has a legitimate interest in limiting his contact with others, including civilians, and otherwise preventing the spread of that condition. *See United States v. Johnson*, 30 MJ 53 (CMA 1990).[2]

The decision of the United States Air Force Court of Military Review is affirmed.

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[2] We have absolutely no doubt that preventing a servicemember who has HIV from spreading it to the civilian population is a public duty of the highest order and, thus, is a valid military objective. It is clear to us that such conduct could be found to be service-discrediting. Art. 134, Uniform Code of Military Justice, 10 USC § 934; *see also United States v. Woods*, 28 MJ 318-19 (CMA 1989).

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